In The

Supreme Court of the United States

October Term, 1977

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM, and CHARLES LaPLANTE,

Respondents.

BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CASES

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

STATUTES

TABLE OF CONTENTS—Continued

OTHER AUTHORITIES

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OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska is unpublished, and is reproduced in the Appendix to the Petition for a Writ of Certiorari on pages 24a to 48a. The opinion of the Court of Appeals for the Eighth Circuit is reported at 576 F. 2d 1274 and reproduced in the Appendix at pages 2 to 25.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals was entered on May 18, 1978. A timely petition for rehearing en banc was denied on June 9, 1978. The petition for certiorari was filed on August 4, 1978. Certiorari was granted on October 2, 1978.

STATUTES INVOLVED

The following sections of the Nebraska statutes are pertinent herein:

Neb. Rev. Stat. § 83-192 (Reissue 1976):

"The Board of Parole shall:

"(1) Determine the time of release on parole of committed offenders eligible for such release;

"(2) Fix the conditions of parole, revoke parole, issue or authorize the issuance of warrants for the arrest of parole violators, and impose other sanctions short of revocation for violation of conditions of parole;

"(3) Determine the time of discharge from parole;

"(4) Visit and inspect any facility, state or local, for the detention of persons charged with or convicted of an offense, and for the safekeeping of such other persons as may be remanded thereto in accordance with law;

"(5) Serve in an advisory capacity to the Director of Correctional Services in administering parole services within any facility and in the community;

"(6) Interpret the parole program to the public with a view toward developing a broad base of public support;

"(7) Conduct research for the purpose of evaluating and improving the effectiveness of the parole system;

"(8) Recommend parole legislation to the Governor;

"(9) Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record, his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole;

"(10) Make rules and regulations for its own administration and operation;

"(11) Appoint and remove all employees of the board and delegate appropriate powers and duties to them;

"(12) Transmit annually to the Governor a report of its work for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

"(13) Exercise all powers and perform all duties necessary and proper in carrying out its responsibilities under the provisions of this act."

Neb. Rev. Stat. § 83-1,111 (Reissue 1976):

"(1) Every committed offender shall have a hearing before a majority of the members of the Board of Parole within sixty days before the expiration of

his minimum term less any reductions. Every committed offender shall be interviewed within sixty days prior to his final parole hearing by a member of the Board of Parole. The hearing shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

"(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall include the opinion of the member who presided at the hearing. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

"(3) If the board fixes the release date, such date shall be not more than six months from the date of the committed offender's parole hearing, or from the date of last reconsideration of his case, unless there are special reasons for fixing a later release date.

"(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

"(5) The release of a committed offender on parole shall not be upon the application of the offender, but by the initiative of the Board of Parole. No application for release on parole made by a committed offender or on his behalf shall be entertained by the board. Nothing herein shall prohibit the Director of Correctional Services from recommending to the board that it consider an individual offender for release on parole."

Neb. Rev. Stat. § 83-1,114 (Reissue 1976):

"(1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

"(a) There is a substantial risk that he will not conform to the conditions of parole;

"(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

"(c) His release would have a substantially adverse effect on institutional discipline; or

"(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

"(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

"(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

"(b) The adequacy of the offender's parole plan;

"(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

"(d) The offender's intelligence and training;

"(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

"(f) The offender's employment history, his occupational skills, and the stability of his past employment;

"(g) The type of residence, neighborhood or community in which the offender plans to live;

"(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

"(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

"(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

"(k) The offender's attitude toward law and authority;

"(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

"(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

"(n) Any other factors the board determines to be relevant."

Neb. Rev. Stat. § 83-1,115 (Reissue 1976):

"Before making a determination regarding a committed offender's release on parole, the Board of Parole shall consider the following:

"(1) A report prepared by the institutional caseworkers relating to his personality, social history and adjustment to authority, and including any recommendations which the staff of the facility may make;

"(2) All official reports of his prior criminal record, including reports and records of earlier probation and parole experiences;

"(3) The presentence investigation report;

"(4) Recommendations regarding his parole made at the time of sentencing by the sentencing judge;

"(5) The reports of any physical, mental and psychiatric examinations of the offender;

"(6) Any relevant information which may be submitted by the offender, his attorney, the victim of his crime, or by other persons; and

"(7) Such other relevant information concerning the offender as may be reasonably available."

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole by the Nebraska Board of Parole?

2. If the Due Process Clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole, what procedures are constitutionally mandated?

3. Whether the procedures followed by the Nebraska Board of Parole comply with all constitutionally mandated procedures, if any?

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STATEMENT OF THE CASE

This case was filed as a class action in 1972 by a number of inmates of the Nebraska Penal and Correctional Complex against the members of the Nebraska Board of Parole, of which John B. Greenholtz was and is Chairman. It was brought under 42 U. S. C. § 1983, and the complaint alleged violations of the inmates' constitutional rights in various respects.

As no one group could properly represent all of the classes, the district court designated different inmates as representatives of the various classes, and appointed counsel to represent each class. It was eventually treated as three separate suits, since the different claimed violations were not related. There were separate trials and appeals with respect to the various classes. We are here concerned with the class claiming that they were denied procedural due process in the granting or denial of discretionary parole.

In Nebraska, paroles are of two types, mandatory and discretionary. Mandatory parole is given when an inmate has served his maximum sentence less good-time credit. See Neb. Rev. Stat. § 83-1,107 (1) (b). We are not concerned herein with mandatory parole.

An inmate becomes eligible for discretionary parole upon serving his minimum term, less good-time credits. It is that type of parole which is the subject of this action.

Parole hearings are of two types, parole review hearings and final parole hearings. The exact procedure is based partly on statute, and partly on the practices that have been followed by the board for a number of years.

Parole review hearings must be held with every committed offender at least once each year, whether or not he is eligible for parole, under the provisions of Neb. Rev. Stat. § 83-192 (9). Section 83-1,111 also requires a hearing for eligible inmates at least once each year. The board has construed this as simply calling for a parole review hearing, rather than for a final parole hearing.

Final parole hearings have, in some instances, been called simply "parole hearings," and, as a matter of fact, the stipulation entered into herein (A30) called them simply "parole hearings." This, however, is a misnomer, as the parole review hearings are also "parole hearings." Section 83-1,111 refers to a "final parole hearing," and members of the board usually do, also (R43, 61, 67).

Final parole hearings for discretionary parole are never automatic, but are set, at the discretion of the board, following a parole review hearing. At the parole review hearing the board reviews the inmate's record and talks to him. He is not permitted to offer evidence, but the board will accept letters that he may wish to present (R55-56). If the inmate is not then eligible for parole, he is deferred until a later parole review hearing, or until he is eligible. If he is eligible, the board will either schedule him for a final parole hearing, or defer him to another parole review hearing, not later, of course, than one year later (R44-45).

If the board concludes at the parole review hearing that an eligible inmate may be a good candidate for parole, he is set for a final parole hearing. At a final parole hearing the inmate may present evidence, including calling witnesses. He is permitted counsel. He is not

permitted to hear opposing testimony, or, of course, cross-examine opposing witnesses (R56).

Inmates are advised in advance of the month in which their parole review or final parole hearings will be held, and are notified of the exact time by posting at the Nebraska Penal and Correctional Complex on the date of the hearing.

Following a parole review hearing, inmates are sent one of two form notices (A35-37). One form notifies the inmate that his case has been deferred until a specified month, and lists 5 specified reasons which roughly track the reasons for denial enumerated in Neb. Rev. Stat. § 83-1,114, and a blank for other reasons. The form also contains recommendations for correcting deficiencies.

The other form notifies the inmate that his case has been set for final hearing in a certain month.

Parole counselors are provided at the penitentiary. Each inmate is assigned to a particular counselor, who meets with his inmates periodically—about six times a year—and is available whenever the inmate wants to talk to him. The counselor attends parole review hearings and final parole hearings, and assists the inmate in the preparation of his parole plan (R49-54).

Following a final parole hearing, the inmate is notified either that he will be paroled, or that he has been denied and deferred until another parole review hearing. If he has been denied parole, he is notified by letter, which also states the reason for denial. Respondents found eight such letters written in a period of 23 months which did not contain reasons (R12). The records of the hearings

on those eight inmates were introduced. They showed that one of the eight was not eligible because of loss of good time credits, one said at the hearing he did not want a parole, and one did not appear at the hearing, but sent a note to the board waiving his hearing. One of the members of the board testified that failure to include reasons for denial was a departure from the practice of the board (R57).

Following a trial on May 31, 1977, the district court found that procedural due process applied to the parole proceedings, and that the board's practices in some respects exceeded constitutional requirements, and in other respects fell short. The court said the following procedures were required: (1) Every inmate eligible for parole must be afforded a formal parole hearing. (2) At least 72 hours prior to the time of the hearing the inmate must receive written notice of the date and hour of his hearing, accompanied by a concise listing of the factors the board might consider in evaluating an eligible inmate for discretionary parole. (3) The inmate must be allowed to present evidence in support of his application for parole, subject to prison security considerations. (4) A record of the proceeding was to be maintained. (5) Within a reasonable time following the parole hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole (Appendix to Petition for Certiorari, pp. 39-43).

On appeal, the Court of Appeals affirmed in part and reversed in part, holding that procedural due process applied, but modifying the required procedures to the following: (1) Every inmate is to receive a formal parole

hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the board. (2) Every inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the board in making its determination. (3) Subject to security considerations, every inmate is allowed to appear in person before the board and present documentary evidence in support of his application. In the absence of unusual circumstances, an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole (A23-24).

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SUMMARY OF ARGUMENT

Procedural due process is more clearly indicated in the situation where action of the government changes the condition of a citizen to his detriment than where the government simply refuses to change a condition at his request. If due process applies at all to the latter situation, the requirements are far less than in the former.

Whether an inmate will be granted discretionary parole is dependent, by statute, upon reaching an opinion that parole for this particular inmate is proper. It is not dependent upon any particular factual determinations, and

no facts that may be found to exist entitle an inmate to discretionary parole. All of the criteria by which the board is to reach the decision are subjective, except facts which have already been determined in a due process hearing. A due process type hearing is ill-suited for reaching such determinations, and this court has not required them in this type of situation.

Since denial of parole is not necessarily based on misconduct on the part of the inmate, no stigma attaches to such denial, and therefore no protectable liberty interest is involved.

The procedures mandated by the Court of Appeals carry with them almost no benefits to the inmates, since they will never be able to show facts entitling them to parole, if the board thinks they should not have one. So far as the board is concerned, however, it will require more final hearings, and will require much wasted effort on the part of the board and the parole counselors.

Requiring the board to state the essential facts relied upon will force the board to make a record in each case, probably introducing evidence, to justify their reaching subjective conclusions not easily susceptible of proof. It will probably change the focus of the hearing from the statutory criteria to superficial "facts." It may very well lead to judicial review in state court, which does not now exist, or to federal habeas corpus or civil rights actions based upon alleged inadequacy of evidence to sustain denials.

Nebraska now gives each inmate a hearing each year. He can present letters to the board, and attempt to convince them of his worthiness for parole. The board con-

siders his entire record. If he is denied, he is told the reasons for denial. If he is granted a final parole hearing, he can have counsel and present evidence. The procedures more than comply with those prescribed by the other circuits which have said due process applies at all.

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ARGUMENT

I.

Procedural due process does not apply to hearings conducted to determine whether an inmate should be granted discretionary parole.

We submit that the Court of Appeals has taken cases decided by this Court dealing with adverse changes in a person's present condition, which changes were authorized only upon proof of specific facts, and has misread them to apply to the parole granting or denial situation. We believe none of this Court's decisions point in the direction taken by the Court of Appeals.

A. Due Process Requirements Are Less Appropriate for a Continuation of a Condition than for an Adverse Change in a Condition.

The Court of Appeals relied heavily on *Morrissey v. Brewer,* 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972); *Wolff v. McDonnell,* 418 U. S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); and *Gagnon v. Scarpelli,* 411 U. S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756 (1973). All of those cases (as do almost all other decisions of this Court

that have come to our attention) involved adverse action taken by an administrative or judicial body to change the condition of the person against whom the action was taken.

In *Morrissey v. Brewer, supra,* the Chief Justice, in footnote number 8 quoted the following language from *United States ex rel. Bey v. Connecticut Board of Parole,* 443 F. 2d 1079, 1086 (2d Cir. 1971):

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

An article by Judge Henry B. Friendly found in 123 U. of Pa. L. Rev. 1267 has been referred to several times by this Court. In that article Judge Friendly draws a distinction between cases where the government is seeking to take some action against a citizen and those in which it is simply denying a citizen's request, and says (pp. 1295-1296):

> "But the distinction has a notable lineage. The famous Article 39 of Magna Carta, often seen as the origin of the concept of due process, speaks in terms of the king's going out or sending against a free man, not of his refusing a request. And whatever the mathematics, there is a human difference between losing what one has and not getting what one wants. This point is convincingly developed, in the context of revocation as distinguished from denial of parole, in Chief Justice Burger's opinion in Morrissey v. Brewer."

Even in *Wolff v. McDonnell,* where the Court held procedural process applied to the loss of good time cred-

its, the Court said that it was qualitatively and quantitatively different from revocation of parole or probation. Further, in *Wolff v. McDonnell* there *was* a change effected by the action of the administrative body, since credits which the inmate had earned were taken away from him. As the Court pointed out, this might not ultimately result in any adverse consequences. Nevertheless, it was the result of affirmative action on the part of the prison officials, not refusal to act. We are here concerned with a refusal to grant parole, a purely negative action. It is therefore another step beyond *Wolff v. McDonnell* in that respect.

The Fifth Circuit has relied on such distinction in denying procedural due process in the parole granting area. See *Brown v. Lundgren,* 528 F. 2d 1050 (5th Cir. 1976), and *Scarpa v. United States Board of Parole,* 477 F. 2d 278 (5th Cir. 1973), vacated and remanded to consider mootness, 414 U. S. 809 (1973), dismissed as moot, 501 F. 2d 992 (5th Cir. 1973).

We are not suggesting that under no circumstances could due process procedures be required for the administrative denial of requested relief. In a clear case of entitlement to relief, conditioned upon specific factual determinations, perhaps the citizen could not be denied the relief without an opportunity to be heard. We are simply saying that the basis for expectation of change in status must be much clearer to bring the Due Process Clause into play than is the case of taking from the citizen a benefit he is presently enjoying. And if due process is held to apply, the extent of the required procedures should be less in the case of a continuation of a status than in the case of a change in status.

B. A Prisoner in Nebraska Has no Liberty or Property Right, Founded on State Law, to Release on Discretionary Parole.

The Due Process Clause of the Fourteenth Amendment protects life, liberty, and property from deprivation by the state without due process of law. Since the prisoner has already been deprived of his liberty by sentence of the court, a parole has been dealt with in property terms. For example, Mr. Justice Douglas said in *Morrissey v. Brewer* (dissenting), at 408 U. S. 493 that a parole was a deed, which when conferred gives a parolee a degree of liberty which is often associated with property interests. In *Wolff v. McDonnell, supra,* this Court said that the analysis as to liberty parallels the accepted due process analysis as to property. We will therefore discuss the issue in property terms, to see whether a prisoner has a "property" interest in his expectation of a discretionary parole. The sine qua non of such a property interest is a reasonable expectation, based upon state law or practice, that he will receive such a parole in the absence of specific factual determinations justifying a refusal to grant it.

Without question there will be a contention that Neb. Rev. Stat. § 83-1,114 (Reissue 1976) gives prisoners in Nebraska such a property right, in view of the language of that section that the board "shall" order his release unless it is of the opinion that his release should be deferred for the itemized reasons. The Court of Appeals made a passing reference to this section in supporting its decision, although it did not explore this issue in depth, but talked in very general terms about the right to procedural due process in the parole granting process. No attempt was made to base its decision on the specific language of the

Nebraska statute. If it had, Nebraska would at least have had an opportunity to cure the situation by amending its statute.[1]

We submit, however, that Neb. Rev. Stat. § 83-1,114 (Reissue 1976) would not support the decision, in any event, because the statute does not condition denial of parole upon any factual basis, but solely on the subjective determination of the board as to the propriety of giving the particular inmate a parole. An evidentiary hearing is ill-suited for making such a determination.

Neb. Rev. Stat. § 83-1,114 (Reissue 1976) was not intended to vest any rights in the inmates to a parole, but was intended, instead, to constitute instructions to the Board of Parole as to the factors to be taken into account in reaching its decisions. In Nebraska, at least, the court has looked with extreme disfavor upon unbridled discretion resting in administrative bodies. In *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 104 N. W. 2d 227 (1960), for example, the court said, with respect to the grant of power to an administrative agency:

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1 We have checked the statutes of other states to determine in what respects they differ from ours. Many states authorize the parole board to adopt regulations with respect to the granting of parole, so it is difficult to determine what the exact situation is in those states. Some statutes provided that the board "may" grant parole after various subjective findings. Others provide that the board "shall" do so. See, e. g., Code of Ala. 1975, § 15-22-26; West's Ann. Calif. Codes § 3041 (b); Title 17-1-201, Colo. R. S. 1973; § 906.4, Iowa Code Ann.; S. Dak. C. L. 23-60-12; § 40-3614, Tenn. Code Ann.; T. 28, § 1051, Vt. Stat. Ann. North Carolina has a statute similar to Nebraska's. It provides that the board may refuse to release an inmate on parole if it reaches a certain specified conclusion. See § 15A-1371, N. C. G. S.

> "The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. . . ."

We therefore submit that the rather detailed factors to be taken into account under Neb. Rev. Stat. § 83-1,114 (Reissue 1976) are simply a reflection of the Legislature's awareness that a grant of authority to the board to parole in its unfettered discretion might not pass muster in the Nebraska Supreme Court.

We also submit that the use of the word "shall" instead of "may" has no significance. It is, of course, conditioned on the board's having a certain opinion, not upon its finding particular facts. Furthermore, in this context there can be no difference in the meaning of "shall" and "may," unless we are to assume that the use of the word "may," in some of the state statutes was intended to authorize completely arbitrary or even discriminatory actions.

For example, the Iowa statute is very similar to that of Kansas. Section 906.4, Iowa Code Ann. provides that the board "shall" parole the inmate "when in its opinion there is a reasonable probability that such person can be released without detriment to the community or to himself or herself." Kan. Stat. Ann. § 22-3717, on the other hand, provides that the authority "shall have the power" to release inmates when, in the opinion of the Authority, "there is a reasonable probability that such persons can be released without detriment to the community or to themselves."

To suggest that there is any difference between the Iowa and Kansas statutes is to say that in Iowa the board

must release the inmate when it reaches the prescribed conclusion, but that in Kansas the parole authority which has reached that same conclusion may refuse to release, for undisclosed reasons of its own, which reasons were not specified by the Legislature. In Nebraska, at least, we suspect that our Supreme Court would not countenance such a construction.

Every parole authority reaches its decision to parole or not to parole on the basis of considerations identical, or very similar, to those listed in Neb. Rev. Stat. § 83-1,114 (Reissue 1976). The fact that the Legislature articulated them, instead of authorizing the board to do so by regulation, has no significance so far as their creating a property interest in the inmate is concerned. Nor does the use of the word "shall" have significance, in view of the subjective nature of determinations to be made by the board.

We therefore submit that the decision of the Court of Appeals cannot be sustained on the basis of any peculiarities of the Nebraska statute. The situation in Nebraska is no different from that in every other state where a board is given discretionary authority to grant or deny paroles. Whether set out in the statute, the board's regulations, or a uniform practice, every parole board has such standards, unless we are to assume that its actions are purely whimsical.

C. A Right which Gives Rise to Procedural Due Process Must Be Conditioned upon Findings of Specific Facts, as Opposed to Subjective Conclusion Reached by the Decision-Making Body.

This Court has, almost without exception, found a "property" right requiring procedural due process only when the deprivation of that right was required to be based upon a finding of specific facts. There is no such requirement in Nebraska, nor, so far as we are aware, in any other state, when discretionary parole is denied.

In *Board of Regents v. Roth,* 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), this Court said that to have a property interest in a benefit, a person must have a legitimate claim to entitlement thereto. In the case of parole, of course, that claim must rest upon the statute. Neb. Rev. Stat. § 83-1,114 does not create such a legitimate claim.

Even in cases in which this Court held procedural due process to apply, it has, time after time, stressed the factual nature of the required findings. In *Goldberg v. Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 96 S. Ct. 1011 (1970), this Court quoted from *Green v. McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959), to the effect that where governmental action seriously injures a person, *and the reasonableness of the action depends on fact findings,* the evidence used must be disclosed so that he has an opportunity to show that it is untrue.

In *Morrissey v. Brewer, supra,* the Chief Justice pointed out that a parole could be revoked only upon proof of the violation of the conditions of the parole, and that

the first step in the revocation process involved the wholly retrospective factual question of whether such violation had occurred. Mr. Justice Douglas, in a concurring and dissenting opinion, said that the purpose of the required hearing was to determine the fact of parole violation.

In *Goss v. Lopez,* 419 U. S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975), the Court required some sort of hearing, "to determine whether the conduct has occurred." In *Gagnon v. Scarpelli, supra,* the issue was whether the probationer had violated the terms of probation, a purely factual determination. In *Wolff v. McDonnell, supra,* this court said:

> ". . . Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (1951), said that fairness can rarely be obtained by secret, one-sided determination of *facts* decisive of rights.

In *Arnett v. Kennedy,* 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974), Mr. Justice White, concurring and dissenting, said that if termination of government employment was for reasons of pure inefficiency it was at least arguable that a hearing would serve no useful purpose, and that judgments of that kind were best left to the discretion of administrative officials. The types of determinations to be made with respect to the granting

of parole are even less adapted to resolution in an evidentiary hearing than the example given by Mr. Justice White. The gist of the various opinions in *Arnett v. Kennedy* holding the employees had a protectable interest based that holding on the fact that the statute provided that he could not be discharged except for cause, a factual issue susceptible of proof.

In *Perry v. Sindermann,* 408 U. S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), this Court said that if the terminated professor could establish a tenure system under which he could not be terminated except for "sufficient cause," he would be entitled to a hearing to determine whether such cause existed. In *Mathews v. Eldridge,* 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), the Court said that central to the evaluation of any administrative process is the nature of the relevant inquiry.

None of the four reasons for denial of parole listed in Neb. Rev. Stat. § 83-1,114 (Reissue 1976) are based on factual determinations, but are specifically based on the "opinion" of the board. Further, the fourteen factors the board is to take into account are not readily susceptible of "proof," or if they are, are matters of record. There are no "facts" listed in that section which would require either a denial or a granting of parole. Even factor (1), the inmate's conduct in the facility, including disciplinary reports, is only something the board is to consider in reaching its decision. The disciplinary reports are matters of record, and the inmate will already have had a due process hearing with respect to such reports, pursuant to *Wolff v. McDonnell, supra.*

This Court said in *Morrissey v. Brewer, supra:*

> ". . . Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime."

The only hard "facts," as distinguished from opinions, that go into the parole decision have already been determined in a due process hearing. It certainly should not be required that the board hold another hearing to consider the accuracy of the previous fact finding. In *Dixon v. Love,* 431 U. S. 105, 52 L. Ed. 2d 172, 97 S. Ct. 1723 (1977), this Court held a hearing unnecessary to relitigate traffic convictions, where the driver had already had a full judicial hearing.

The only case authored by this Court of which we are aware in which procedural due process was required under standards remotely approaching those specified in Neb. Rev. Stat. § 83-1,114 is *Kent v. United States,* 383 U. S. 541, 16 L. Ed. 2d 84, 86 S. Ct. 1045 (1966). Even in that case, several factual determinations were prescribed, and, apparently, all of the factors were required to be considered. For example, a showing would be required as to whether the offense was committed in an aggressive, violent, premeditated, or willful manner.

Furthermore, *Kent* involved a proceeding in a court of law, in which due process procedures are much more commonly expected and demanded than would be expected of an administrative body. It involved, in effect, at least, a procedure in a criminal trial, since it was a preliminary step necessary to the criminal trial. Under those circumstances, we would expect more formal procedures to be required in the *Kent* situation than would be required of

an administrative agency. In *Morrissey v. Brewer* this Court drew a distinction between a criminal prosecution and revocation of parole, indicating that a criminal prosecution carried more due process rights.

When the administrative action was not conditioned on factual determinations, this Court has refused to require procedural due process. *Meachum v. Fano,* 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976), and *Montayne v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976), made that clear. In *Meachum v. Fano* the Court said:

> "Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, *defeasible only upon proof of specific acts of misconduct.* Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of *specified events.* On the contrary, transfer in a wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in Wolff v. McDonnell is totally nonexistent in this case." (Emphasis supplied.)

The Court then went on to say that the fact that the inmate's conduct may have influenced the transfer decision did not give rise to a right to a hearing to determine the accuracy of the charges, because the inmate's legal rights would not have been violated whether or not the misconduct was proved. So long as the prison officials had discretion to transfer for whatever reason or for no reason at all, the prisoner's expectation to remain at a particular prison so long as he behaved himself was "too ephemeral and insubstantial to trigger procedural due process protections."

We point out that *Meachum v. Fano* and *Montayne v. Haymes* involved adverse changes in condition, instead of a refusal to make a change, so, as we showed in a previous section of this brief, due process procedures are even less called for in the parole denial situation.

In *Smith v. Organization of Foster Families for Equality and Reform,* 431 U. S. 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977), Mr. Justice Stewart, concurring, said that, "New York confers no right on foster families to remain intact, defeasible only upon proof of specific acts or circumstances." He pointed out that transfers are made under a variety of circumstances, often involving no more than informed predictions of what would best serve the safety and welfare of the child. Therefore, he would have held, the predicate for invoking the due process clause—the existence of state-created liberty or property —was missing.

In *Board of Curators, University of Missouri v. Horowitz,* — U. S. —, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978), the Court did not decide whether the dismissed student had constitutionally protected interests, but assuming that she did, held that she had been afforded all that she was entitled to, even though she was given no hearing at all before the decision-making body. The Court pointed out the significant differences between the failure of a student to meet academic standards and the violation of valid rules of conduct, saying that the former requires far less stringent procedural safeguards than the latter, and said:

> ". . . Like the decision of an individual professor as to the proper grade for a student in his course,

> the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making."

The situation of the dismissed student closely resembles that of the inmate denied parole. The student was dismissed (and denied graduation) because of various academic failures and intangible considerations, not susceptible of direct proof. No "charges" were made against her. A hearing before the decision-making body would have been of little value. The inmate, also, has not necessarily been "charged" with anything (or, if he has, he has already had a hearing). The decision as to whether to "graduate" him, by giving him a parole, is based upon "an expert evaluation of cumulative information," not susceptible of direct proof. The parole board's decision to hold the "student" over for more "schooling," instead of "graduating" him should certainly require no more elaborate procedures than were required in *Horowitz.*

The risk of wrongful use of whatever procedure is employed must be judged "in the context of the issues which are to be determined in that proceeding." *Mitchell v. W. T. Grant Co.,* 416 U. S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974). We cannot imagine what type of evidence could be adduced that an inmate's release would or would not depreciate the seriousness of the inmate's offense, or have a substantially adverse effect on institutional discipline. Whether he will or will not conform to the conditions of parole, or whether his continued incarceration will "substantially enhance his capacity to

lead a lawabiding life when released at a later date" are simply conclusions the board must reach from a consideration of his entire record. To require "evidence" on such matters is simply to substitute the opinions of the witnesses for those of the board, which is statutorily vested with the authority to reach conclusions on such matters.

D. A Denial of Parole Carries with it No Stigmatizing Effect Giving Rise to a Protected Liberty Interest.

In *Board of Regents v. Roth, supra,* the Court pointed out that in declining to hire the respondent, the state made no charges against him that might damage his standing in the community, since it did not base its action on a charge of dishonesty or immorality. The Court indicated that had the state done so, a hearing would be required to permit him to clear his name. See also, *Bishop v. Wood,* 426 U. S. 341, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); *Joint Anti-Fascist Refugee Committee v. McGrath, supra;* and *Cafeteria Workers v. McElroy,* 376 U. S. 886, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961).

We submit that no tenable claim can be made that a denial of parole will have such an effect on the inmate's reputation as to deprive him of a liberty interest, requiring due process.

In the first place, of course, the inmate's reputation will have been somewhat tarnished by his original conviction, so it will be hard for him to argue that denial of parole damaged it further. The terminated employees in *Roth* and *Bishop* were far more likely to have been damaged in their employment prospects.

More important, however, is the fact that denial of parole is not based upon specific charges of misconduct, and no such implication can be legitimately drawn from such denial. There is no public announcement of reasons for denial. If misconduct was a factor in the denial, as we have previously pointed out, he will already have had a due process hearing on the misconduct. A denial, therefore, has no stigmatizing effect, and the inmate suffers no consequence in addition to the denial of his immediate freedom. *Board of Regents v. Roth* teaches that the immediate consequences of the administrative action is not enough to trigger procedural due process rights.

E. A Balancing of the Benefits of Additional Procedures Against the Costs Militates Against Such Requirements.

An argument may be made that the procedures ordered by the Court of Appeals are not burdensome, and that some of them are already afforded to inmates by statute or by practice of the board, and that therefore no harm to petitioners will result in affirming the judgment of the Court of Appeals. We submit that such an argument is fallacious.

First, we have previously discussed the subjective nature of the criteria used in determining whether an inmate shall be paroled. A formal evidentiary hearing will add little or nothing to the parole board's understanding of the inmate and his probability of successfully completing a parole. The decision has been and will continue to be made on the basis of the total record of the inmate, and a subjective appraisal of his character. All that such

a hearing will add will be largely irrelevant facts, and opinions from biased or uninformed sources.

The Court of Appeals ordered that each inmate have a formal parole hearing upon first becoming eligible for parole. Under present statutes and practices he has a parole review hearing within sixty days before becoming eligible for parole, and each year thereafter. We submit that few, indeed, will be the inmates who are paroled after the mandated formal parole hearing, whose records are such that the board would not have scheduled them for a final parole hearing under present procedures.

The Court of Appeals required that each inmate receive a written notice of the date and hour of the hearing reasonably in advance, together with a list of the factors to be considered by the board. They are presently notified of the month of the hearing, and are notified of the exact time through posting of such information at the penal complex on the date of the hearing. Certainly they are given sufficient time in which to prepare any presentation they may wish to make, particularly their parole plan, which is, no doubt, the single most important part of their bid for parole. So far as the inmates are concerned, they are seldom gone on vacation or have conflicting appointments on the day their parole hearing is set. If they have witnesses, there might be some advantage to having an exact time set in advance, but there is no evidence that the board is not accommodating in that situation under present practices.

If they are notified of the factors to be considered by the board, the notification will, no doubt, be in the exact words of the statute. While this might not be particularly burdensome, it does seem somewhat ludicrous to require, *as a constitutional right,* that they be notified as to statutory provisions.

We will not discuss the cost-benefit ratio of the requirement that inmates be allowed to appear before the board and present documentary evidence, since they are now given that right. Likewise, the board now preserves a record of its hearings which is capable of being reduced to writing. We do, of course, deny that such procedures are constitutionally mandated.

The fifth requirement of the Court of Appeals was that each inmate who is denied parole must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial. They are now told the reasons for denial, and in view of the subjective nature of the determinations involved, a statement of the evidence relied upon will seldom have any real meaning to them.

We therefore submit that the benefit to the inmates of the procedures mandated by the Court of Appeals will be insignificant. The problems it will create for the Board of Parole will not be.

In *Mathews v. Eldridge,* 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), this Court held that a determination of the dictates of due process required consideration of the private interest affected, the risk of erroneous deprivation of that interest and the probable value of additional procedures, and the Government's interest, including fiscal and administrative burdens involved in the additional requirements. See also, *Ingraham v. Wright,*

430 U. S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977). A careful examination of the realities will show that the costs far outweigh the almost nonexistent benefits.

First, let us consider the requirement that all inmates receive a formal parole hearing upon becoming eligible for parole. At present, they receive a parole review hearing, and if the board feels they are likely candidates for parole, they are given a formal (final) parole hearing. What this order means, in effect, is that those inmates who the board feels, after a personal interview and a review of their records, are not then ready for parole must, nevertheless, be given a formal parole hearing. What percentage of the inmates would be affected by this order is not disclosed by the evidence, but would, we assume, be substantial. A formal parole hearing is, of course, a more lengthy procedure than a parole review hearing, which lasts an average of about ten minutes. The added hearings would increase the load of the board, which already must conduct many hundreds of such hearings each year.

More important, however, is the burden on the parole counselors. Neb. Rev. Stat. § 83-1,114 requires the board, in considering an inmate for parole, to take into account the adequacy of the offender's parole plan. No plans are prepared for parole review hearings, but if an inmate is set for a final hearing, a parole plan must be prepared. One of the things that must be included in the plan is employment while on parole. The inmate is, of course, in no position to line up a job, so someone, presumably the parole counselor, must do so. Counselors will therefore be confronted with inmates who everybody in his right

mind knows have no chance whatever of being granted an early parole, but for whom parole plans must be prepared. Failure to prepare one would make the hearing a farce, as no one would be paroled without one. Good faith would require someone to contact prospective employers, to get them to promise a job to someone who has no realistic chance of being paroled! In addition to the added work on the counselors, it probably will make it more difficult to line up work for people who actually will be paroled.

Probably the most troublesome part of the Court of Appeals' order is the requirement that the inmate be furnished with an explanation of the essential facts relied upon in denying parole. As we have pointed out again and again, the board's decision is seldom based upon articulable "facts," but upon an overall appraisal of the man, his record, his crime, etc. Just as it will be difficult to present meaningful evidence to justify the board's action, it will be difficult or impossible to summarize that evidence. The board can state the reasons for denial, as, for example, that the inmate's release would depreciate the seriousness of the crime or promote disrespect for law, but what "facts" would one rely upon in reaching that conclusion?

While we are not trying to raise imaginary specters, we are concerned that a requirement of a due process hearing may result in judicial review of the actions of the board, either by direct appeal in the state court, or by habeas corpus or civil rights actions in federal court.

At the present time, there is no judicial review of denial of parole. Perhaps there will not be, even if the

hearings are held to be constitutionally mandated. Judge Friendly, in his article in 123 U. of Pa. L. Rev. 1267 says, at page 1294:

> "Although I have not researched the state decisions, my impression is that, up to this time, judicial review in the area of mass justice has largely been limited to questions of fair procedure, and there has been little attempt to obtain review for lack of substantial evidence or even for arbitrariness or capriciousness. Would that it may remain so! The spectacle of a new source of litigation of this magnitude is frightening."

Nevertheless, there is a very real danger that a holding that a formal evidentiary hearing is constitutionally mandated, and that the board must state the facts it relies on to deny parole may result in judicial review. Since, under Neb. Rev. Stat. § 83-1,111 (Reissue 1976), release on parole is not on the application of the inmate but upon the initiative of the board, we do not consider such hearings to be contested cases. However, if they are required by the Constitution, they may well be held to be contested cases, and appealable in state court. The volume of litigation would be overwhelming, in view of many inmates' love of litigation.

In *Goldberg v. Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), we find the statement that the decision-maker's conclusion "must rest solely on the legal rules and evidence adduced at the hearing," and the further statement that the requirement of a statement of the reasons for the determination and the evidence relied on is to demonstrate compliance with "this elementary requirement."

If this language is held applicable to the parole release hearings, it threatens the continuation of the parole system, in Nebraska, at least. It will certainly be argued that the board has the burden of presenting evidence justifying denial. Often the reason will simply be the nature of the crime committed, or the board's appraisal of the man. It may be very difficult to make a record which would convince an appellate court, looking at a cold record, that a denial was justified. In any event, the board would be faced with the burden of making such a record in every case, enormously increasing the workload of the board and its almost nonexistent staff. A discussion of the implications of mandating procedural due process in this situation is found in *Dorado v. Kerr,* 454 F. 2d 892 (9th Cir. 1972), cert. denied, 409 U. S. 934, in which the Court indicated that to require such procedures would convert the present flexible administrative sessions into judicial hearings, would change the nature of the California indeterminate sentencing procedure, bringing it into the state court system, and would greatly increase the judicial load of California courts.

Besides the problem of state appellate review, it would seem that *Goldberg v. Kelly* would permit federal habeas corpus or civil rights actions. If a denial must be based solely on legal rules and "evidence" adduced at the hearing, we presume that a federal court might hold that an inmate's constitutional rights were denied if no evidence was adduced to justify denial, or the court felt that the evidence adduced was insufficient, or did not sustain the denial. This Court, in *Wolff v. McDonnell,* hinted quite clearly that judicial review was a possibility, where fundamental constitutional rights were abridged.

We therefore submit that the seemingly innocuous relief ordered by the Court of Appeals is not such at all, but carries far-reaching implications. If forced into such a position we suspect that many states will simply do away with discretionary parole, and opt for fixed sentences.

II.

If due process applies to parole release proceedings, Nebraska already complies with all required procedures.

Mr. Justice Stevens, in his dissent in *Scott v. Kentucky Parole Board,* 429 U. S. 60, 50 L. Ed. 2d 218, 97 S. Ct. 342 (1976), listed cases from the Fifth and Sixth Circuits holding due process does not apply to parole release, and cases from the Second, Fourth, Seventh, and D. C. Circuits holding that it did. The Court of Appeals showed the same split. We believe that the Third and Ninth Circuits should be added to those holding that it does not apply. See *Madden v. New Jersey State Parole Board,* 438 F. 2d 1189 (3d Cir. 1971), and *Dorado v. Kerr, supra.*

As can be seen from Mr. Justice Stevens' footnote, those circuits that have held that it applies have, in general, limited the required procedures to a statement of reasons for denial of parole. In *Franklin v. Shields,* 569 F. 2d 784 (4th Cir. 1978), *cert. denied,* 98 S. Ct. 1659, the original panel had ordered more extensive procedures, but the court sitting en banc reversed the panel and limited the required procedures to a statement of reasons for denial. *Morrissey v. Brewer, supra,* and *Mathews v. Eldridge, supra,* teach that due process is flexible and "calls for such procedural protections as the particular situation demands." The factors cited in *Mathews v. Eldridge,* 424 U. S. at 335, show that the procedures ordered by the Circuit Court are excessive, even if this Court concludes that due process applies at all.

Neb. Rev. Stat. § 83-1,111 (Reissue 1976) now requires that an inmate denied parole must be told the reasons for denial and recommendations for correcting deficiencies. The board complies with this statutory requirement. (The fact that in a very few cases over a period of almost two years the board failed to state the reasons can certainly have no constitutional significance, or call for corrective action by the federal courts.)

Nebraska statutes also provide for an annual parole review, with personal appearance before the board and counseling with the board concerning his progress and prospects for future parole. He is permitted to present letters favoring his parole to the board. If he is scheduled for a formal parole hearing, he is permitted to call witnesses, present documentary evidence, and have counsel. Both parole review hearings and final parole hearings are tape recorded. Each inmate has a parole counselor to advise him as to what is needed to get a parole.

We submit that if due process applies at all, what is given by Nebraska far exceeds what is required. The Court of Appeals was pioneering in this area, and we submit that it went far astray.

It appears that the Court of Appeals was attempting to pattern its requirements to fit those required in *Wolff v. McDonnell,* but was faced with a problem that no

"charges" are brought against inmates seeking parole. Therefore, in place of the requirement that advance written notice of the charges be given the inmate, as required in *McDonnell,* the court ordered that a list of the factors to be considered by the board must accompany the notice of hearing, or be posted at the penal institutions. We have previously commented on the incongruity of requiring notification of the contents of a statute as being constitutionally mandated.

If a hearing is required, each inmate now gets one annually, pursuant to statute. In view of the type of determinations to be made, we submit that the parole review hearings comply with any constitutional requirements. See *Goss v. Lopez,* 419 U. S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). A formal, fact-oriented hearing such as is implied in the Court of Appeals' opinion would not be helpful, but would only tend to divert the focus from the statutory criteria.

The requirement of a "full and fair explanation, in writing, of the essential facts relied upon" is particularly burdensome and uncalled for, not only because of the difficulty of articulating the "facts," but because it implies that evidence must be adduced and made a part of the record supporting the board's action.

In *Meachum v. Fano, supra,* this Court cautioned against placing the Due Process Clause "astride the day-to-day functioning of state prisons and involv[ing] the judiciary in issues and discretionary decisions that are not the business of federal judges." In *Hoffman v. Pursue, Ltd.,* 420 U. S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), this Court said that when federal courts are confronted with requests for interference with state civil functions, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. And in *Rizzo v. Goode,* 423 U. S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976), the Court said that in such a situation an injunction should be granted only in the most extraordinary circumstances. These principles, we submit, indicate a denial of relief to respondents herein.

CONCLUSION

We submit that this Court should hold that this case is governed by *Meachum v. Fano and Montayne v. Haymes,* and that procedural due process does not apply. If this court disagrees, the required procedures should be limited to giving a denied inmate a written statement of the reasons for denial. The procedures Nebraska now follows more than comply with any required by the Fourteenth Amendment. The decision below should be reversed.

Respectfully submitted,

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